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No. 115

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WARREN TRADING POST COMPANY, *Appellant*,

v.

THE ARIZONA STATE TAX COMMISSION, ET AL.

On Appeal From The Supreme Court of Arizona

BRIEF OF THE NAVAJO TRIBE OF INDIANS, AS AMICUS CURIAE

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Pursuant to Rule 42(2) and the written consent of the parties hereto, The Navajo Tribe of Indians files this brief as *amicus curiae*.

INTEREST OF AMICUS CURIAE

As *amicus curiae* The Navajo Tribe of Indians associates itself with the position of and adopts by reference the question presented, statement, and the arguments advanced by appellant in its brief, *i.e.*, (1) that the imposition of a state privilege tax on Indian com-

merce is violative of the commerce clause of the Constitution (Art. I, § 8, cl. 3), and (2) that Indian commerce is closed to state regulation because the field has been preempted by Congress by the enactment of a comprehensive system of federal law.

In addition, *amicus* sets forth certain specific facts not included in appellant's brief and which *amicus* believes to be relevant to the disposition of the question presented in this case.

ARGUMENT

I. The Arizona Privilege Tax and the Navajos

The impact of the privilege tax which the Navajo Tribe submits has been improperly sustained by the Supreme Court of Arizona would be much broader and more oppressive to members of the Tribe than appellant indicates. The 24,000-square mile Navajo Reservation, the largest in the United States, spreads over large portions of New Mexico and Utah, as well as Arizona.[1] Likewise, the population of the Navajo Tribe is spread throughout the Reservation portions of these three states.

The States of New Mexico and Utah have had privilege taxes since 1953,[2] but only after the decision of the Supreme Court of Arizona now under review has New Mexico undertaken to impose its privilege tax on Indian reservations.[3] Utah will undoubtedly do likewise.

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[1] The Navajo Yearbook, Report No. viii (U. S. Dept. of the Interior, 1961), p. v.

[2] N. M. Stat. 1953, ch. 72, art. 16; Utah Code Ann. 1953, tit. 59, ch. 15.

[3] See appellant's brief, p. 15, and n. 5.

What would be the effect on the Navajos? Because of the utter absence of street addresses and even of surveys in most of the vast—and largely wilderness—areas of the Navajo Reservation, the population of the Navajo Tribe is commonly believed to be substantially larger than the official count which the United States Bureau of the Census reported for 1960 as 80,364, of whom 45,663 were then estimated to reside in Arizona.[4]

There are 72 non-Indian licensed traders, plus 26 Navajo businessmen, in Arizona. Official reports of gross proceeds of sales by 52 of the Arizona licensed traders are available and they show a total of $6,778,409.36 for the year 1960.[5] If these gross receipts are projected to the total of the 72 Arizona licensed traders in the same ratio, the gross figure becomes $9,385,499. The two per cent tax undertaken to be imposed by Arizona Revised Statutes § 42-1312 therefore would have yielded $187,709.98, which would have meant an average tax burden of $4.11 for the 45,663 Navajos residing in Arizona.

Moreover, although not directly in issue in this case, there would be an *additional* tax should the appellee prevail. Arizona Revised Statutes § 42-1361, enacted by Arizona Laws 1959, Chapter 89, § 1, effective July 1, 1959, provided for an "education excise tax" equal to, by reference, 50 per cent of the amount imposed

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[4] The Navajo Yearbook, Report No. viii (U. S. Dept. of the Interior, 1961), p. 311.

[5] From ledger sheets in files of Tribal Trading Department of the Navajo Tribe, Window Rock, Arizona, maintained as a part of the official records in the administration of the Tribe's regulation of traders. See Navajo Tribal Code, tit. 5, ch. 9; tit. 13, ch. 3. (A set of this two-volume bound code is available in the Court's library.)

by § 42-1312, *i.e.*, one-half of that two per cent, thereby potentially producing a total of three per cent on the transactions which are the subject of this case. Again taking the 1960 gross receipts figure of $9,385,499, the combined *three* per cent rate would have yielded the State of Arizona a new sum of $281,564.97, instead of $187,709.98, and would have imposed a per capita tax burden of $6.16 instead of $4.11.[6]

Lest the foregoing figures be viewed as reflecting a burden of only a niggardly nature, they should be evaluated in the context of the average Navajo per capita cash income, including the value of free goods and services. Although this may be somewhat higher than that of other Indian tribes, the Navajo per capita income still was only $645 per year for 1960.[7]

In the majority opinion below it is said that "there is no suggestion arising out of the stipulated facts that the [Navajo] Indians are less able to pay this tax than other residents of Arizona *of a like or similar status*." (Italics added.) (J.S. A3. n. 7.) This negative statement not only is in itself not meaningful, but it completely ignores the federal legislative intent expressly spelled out *with respect to Indians* in the Navajo-Hopi Rehabilitation Act of April 19, 1950, c.

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[6] This presumes a pragmatic merchandising axiom that the Indian traders would be permitted by the Department of the Interior to pass the tax on to the Indian consumers.

[7] The Navajo Yearbook, Report No. viii (U. S. Dept. of the Interior, 1961), p. 228. These figures were compared with an average per capita income of $2,166 for the nation as a whole. "Even with inclusion of the value of free services, the average per capita income of Navajos in the Reservation area * * * is only 29.8% of the comparable amount received by fellow citizens of the United States." *Id.* at 229.

92, 64 Stat. 44, as amended, now 25 U.S.C. §§ 631-40, section 1 of which authorizes total appropriations of $108,570,000, in 14 enumerated areas of activity,

> * * * in order to further the purpose of existing treaties with the Navajo Indians, to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens * * *.

In its explanation of the bill (S. 2734, 81st Cong., 2d sess.), the enactment of which had been proposed by the Department of the Interior, the House Committee on Public Lands said (H. R. Rep. 1474):

> The committee is convinced that a comprehensive long-range program for the rehabilitation of the Navajo and Hopi Tribes of Indians is essential. *The emergency relief appropriations of recent years have partially alleviated the desperate condition of these tribes but have not attacked the basic problem of helping them improve their economic and social status* in order that such periodic relief measures can gradually be reduced. (Italics added.)

Against this federal legislative history, the imposition of a *state* tax, whatever the rate, not only would constitute a pro tanto frustration of the objectives of provision for "facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization" of the Navajos, and of their ultimate

attainment of "standards of living comparable with those enjoyed by other citizens," but it would be conducive to a retrogression from their present "economic and social status."

The foregoing is not inconsistent with the potential imposition of a sales or transaction privilege tax, with the approval of the Secretary of the Interior, by the Navajo Tribal Council itself, directly to assist in meeting the Tribe's own financial needs. As stated by Mr. Justice Black in *Williams* v. *Lee*, 358 U.S. 217, 221-222, "implicit in these [1868] treaty terms, as it was in the treaties involved in *Worcester* v. *Georgia*, was the understanding that *the internal affairs of the* [Navajo] *Indians remained exclusively within the jurisdiction of whatever tribal government existed.*" (Italics added.)

II. Invasion of the Tribe's Regulation of Traders Using Tribal Lands

The Navajo Tribe, with the approval of the Department of the Interior, already has a comprehensive scheme, of its own enactment, in the trading post area of activity. Chapter 9 of title 5 of the Navajo Tribal Code consists of leasing regulations with respect to traders and trading posts, and chapter 3 of title 13 includes detailed provisions for sanitary permits and sanitary regulation of trading posts.

Because of the great distances involved and the difficulty and expense of transportation to outside markets, the trading posts are vital points of contact, communication, and trade in basic commodities and staple foods. Trading posts have historically been a vital part of Navajo life and economy. Imposition of a privilege tax by the states would constitute an overburden on the rentals charged traders on the Navajo

Reservation, which are based on a percentage of gross sales at each trading post.[8] The added burden could and would weaken and demoralize, if not actually destroy, the Navajo Tribe's own freedom to collect rentals and to regulate trading practices for the general benefit and protection of its people.

CONCLUSION

Because (1) the imposition of a state privilege tax on Indian commerce is violative of the commerce clause of the Constitution, (2) Indian commerce is closed to state regulation by reason of the preemption by Congress of the field through the enactment of a comprehensive system of federal law, and (3) for the additional reasons heretofore set forth in this brief of *amicus curiae*, the decision of the Supreme Court of Arizona should be reversed.

Respectfully submitted.

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[8] Section 747 of title 5 of the Navajo Tribal Code provides that "the lessee [Indian trader] shall pay *rent* at the rate of *one and one-half per cent of the gross receipts* from all wholesale and all retail transactions on or arising from the business conducted on the leased premises; provided, however, that the minimum annual rental for each trading post shall be $300 * * *." (Italics added.)